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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 924

LEWES DAIRY, INC., ET AL., PETITIONERS

v.

CLIFFORD M. HARDIN,[1] SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 66a) is reported at 401 F. 2d 308. The opinion of the district court (Pet. App. 49a) is reported at 260 F. Supp. 921.

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[1] On January 22, 1969, Clifford M. Hardin became Secretary of Agriculture, replacing Orville L. Freeman. Under Rule 48 of the Rules of this Court, Mr. Hardin is automatically substituted as the respondent.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1968 (Pet. App. 88a). A timely petition for rehearing was denied on November 19, 1968. The petition for a writ of certiorari was filed on January 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that substantial evidence in the administrative record supported the Secretary's determination that petitioner had failed to establish the factual predicate of its contention that Milk Marketing Order No. 16 created an illegal trade barrier.

STATUTE AND REGULATION INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*, the Secretary of Agriculture promulgated an order regulating the marketing of milk in an area constituting the major portion of the State of Maryland. Petitioner [2] is a Delaware milk company which purchases

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[2] There are actually two petitioners, Lewes Dairy, Inc., and the Hollybrook Dairy, a partnership. However, during the course of this litigation, Hollybrook Dairy was sold and is no

most of its milk in Delaware and sells it in both Delaware and Maryland. Because a significant portion of its sales is made in Maryland, petitioner is required to pay the minimum prices established under the marketing order on all of its purchases of milk. In these proceedings, petitioner contends that the marketing order may not lawfully be applied to that portion of its purchases which is ultimately sold in Delaware.

1. *The statutory and regulatory framework.* As this Court has long been aware, peculiar and difficult problems have beset the dairy industry and made some regulation necessary.[3] The provisions of the Agricultural Marketing Agreement Act relating particularly to the dairy industry were enacted in response to that need. The Act authorizes the Secretary of Agriculture, after notice and opportunity for hearing,[4] to protect the public interest by issuing orders regulating persons and companies engaged in the marketing of milk ("handlers").[5] A "Marketing Order" may provide for the classification of milk in accordance with the form in which or the purpose for which it is used (*i.e.*, either as fluid milk or manufactured into dairy products) and set a minimum ("uniform") price for

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longer doing business. Its interest in the proceedings, which relates to certain back payments, has been represented by Lewes Dairy (Pet. App. 67a). For convenience, the petitioners are referred to herein in the singular as petitioner Lewes.

[3] See, *e.g.*, *Nebbia* v. *New York*, 291 U.S. 502, 517; *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 549-550; *Lehigh Valley Coop* v. *United States*, 370 U.S. 76, 79.

[4] 7 U.S.C. 608c(3).

[5] 7 U.S.C. 608c(1), (2), (4).

each class which all milk companies must pay for milk purchased from dairy farmers.[6] Further, the order may also provide a method whereby the more profitable fluid milk market, along with the burden of the manufactured or "surplus" milk, may be equitably shared among the farmers supplying the market.[7]

Following the procedures of the Act, the Secretary of Agriculture promulgated Milk Marketing Order No. 16 (originally numbered 127) regulating companies marketing milk in the "Upper Chesapeake Bay Marketing Area" in Maryland. 7 C.F.R. Part 1016. The Order subjects to full regulation handlers which distribute a significant portion—at least 10 percent—of their milk as fluid milk in the marketing area. Under the Order, these regulated handlers are required to pay not less than certain uniform minimum prices depending upon the use made by the handler of the milk it purchases—milk to be used in fluid form (Class I) being priced higher than milk for manufacturing into such items as butter and cheese (Class II). Milk that must be disposed of for manufacturing purposes is known as "surplus" milk and has traditionally commanded lower prices on the open market.

The Marketing Order does not require the handlers to pay these minimum *class* prices directly to the dairy farmers. Rather, it contains provisions to insure that the minimum rate of return to each dairy farmer for his milk is the same, regardless of the use made of the milk by the handler to whom it is sold. The Order accomplishes this by means of a market-wide "pool".

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[6] 7 U.S.C. 608c(5)(A).

[7] 7 U.S.C. 608c(5)(B).

Monthly, each regulated handler reports the value of its total sales of milk in each price class to a Market Administrator. The total value of all the reported sales in the market, after certain adjustments not relevant here, is divided by the quantity of milk sold, thus producing a weighted average between the Class I and the lower Class II price. This monthly average price, known as the uniform or "blend" price, is the minimum price which the regulated handlers must pay to each farmer, regardless of the form in which the handler has sold the milk.

In recognition of the fact that all handlers can be expected to have either a higher or a lower fluid milk utilization rate than the market-wide average (which the blend price reflects) and thus will have either underpaid or overpaid for their milk according to the minimum class prices, the Order established a clearing house operation, known as the producer settlement fund. Each handler either pays into, or draws from the fund the difference between the uniform blend price paid to the farmers and the value of its milk sales computed at the class prices.

2. *This litigation.* Petitioner is a handler with a plant located in Delaware (Pet. App. 70a). It distributes more than 10 percent of its milk as fluid milk in the "Upper Chesapeake Bay Milk Marketing Area" and is thus subject to full regulation under Order No. 16 (Pet. App. 71a).[8] Shortly after Order No. 16 became effective, petitioner, and several Maryland han-

[8] Lewes admits that the portion of its milk distributed in the marketing area is in fact at least 35 percent (Pet. App. 71a).

dlers, filed a joint administrative petition with the Secretary of Agriculture under 7 U.S.C. 608c(15)(A) challenging the Order (Pet. App. 23a). After an administrative hearing, the Secretary rejected their contentions and the companies sought judicial review under 7 U.S.C. 608c(15)(B). As required by that Section, the Maryland companies filed suit in the district court in Maryland, while petitioner filed suit in the district court in Delaware. The Maryland cases were decided first. That proceeding ultimately resulted in a decision by the Fourth Circuit upholding the Secretary on all counts and directing the Maryland handlers to comply with the Order. *United States* v. *Mills*, 315 F. 2d 828 (C.A. 4), certiorari denied *sub nom. Willow Farms Dairy, Inc.* v. *Freeman*, 374 U.S. 832.

Thereafter, in the Delaware proceedings, petitioner moved for summary judgment on a ground not presented in the Maryland action or in the administrative proceedings. Petitioner's contention rested on the fact that it made some of its sales in Delaware, outside of the regulated marketing area and in competition with unregulated milk companies, which, according to Lewes, could obtain milk at lower cost than the minimum prices which petitioner was required to pay under Order No. 16. This asserted cost advantage to its competitors, Lewes contended, penalized it for choosing to sell some of its milk in Maryland and thus created a "trade barrier" forbidden by 7 U.S.C. 608c(5)(G), as interpreted by this Court in *Lehigh Valley Coop* v. *United States*, 370 U.S. 76.[9]

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[9] The decision in *Lehigh Valley* was rendered a full year after the Secretary's initial administrative decision here.

The district court accepted that contention and granted judgment for petitioner. The court of appeals, however, vacated the judgment and remanded the cause "for further administrative consideration and disposition". *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827 (C.A. 3), certiorari denied, 379 U.S. 1000. The court of appeals ruled that the arguments underlying the "trade barrier" issue were "founded essentially upon factual assertions which are not evidentially developed in the [administrative] record, or upon any determination of the facts made by the Secretary of Agriculture * * *." 337 F. 2d at 831-832. The court pointed out that the "trade barrier" question was not "one of simple solution to be decided upon abstractions or assumptions", but that its resolution required "evidence to sustain the factual realities of the legal arguments." 337 F. 2d at 832.

When the case was returned to him, the Secretary reopened the administrative record to receive additional evidence. Upon the evidence presented, the Secretary ruled (Pet. App. 23a) that the record failed to show that the marketing order operated as a "trade barrier." He found that Lewes "has not even proved any competitive disadvantage by virtue thereof in connection with its operations in Delaware, as distinguished from its mere allegations of such disadvantage" (Pet. App. 41). The Secretary pointed out that Lewes' Delaware business had in fact increased significantly since Order No. 16 became effective, while its sales within the Marketing Area had held steady (Pet. App. 44a). Noting that Lewes had not introduced any evidence to establish the actual prices paid by any of its unregulated Delaware

competitors, the Secretary concluded that Lewes' "trade barrier" contentions were based on "abstractions lacking in evidentiary support" (Pet. App. 47a).

Petitioner again sought judicial review in the Delaware district court. Again, that court reversed the Secretary's decision (Pet. App. 49a). The district court determined that "[t]he record clearly shows that Lewes is put at a severe competitive disadvantage by the operation of the Secretary's order" (Pet. App. 58a), and ruled that "full regulation" covering milk purchased for resale outside a marketing area constituted an impermissible "trade barrier" (Pet. App. 64a).

The court of appeals reversed (Pet. App. 66a). Noting that there was "nothing in *Lehigh Valley* [*Coop* v. *United States*, 370 U.S. 76] which inherently invalidates full regulation" under a milk marketing order, the court stated that "it was incumbent on Lewes to demonstrate at the administrative hearing the existence of the alleged trade barrier by showing that it paid more for its milk than its unregulated Delaware competitors" (Pet. App. 78a, 79a). This, the court held, Lewes failed to do (Pet. App. 76a). From the record of the administrative proceedings, including evidence introduced by the Department of Agriculture indicating a steady growth of Lewes' business in Delaware (Pet. App. 79a), the court concluded "that the Secretary's findings were supported by substantial evidence and that Lewes' trade barrier assertion remained a mere abstraction without evidentiary support" (Pet. App. 81a).

ARGUMENT

Since Lewes is required to pay the minimum prices specified by the Order on all purchases of milk, which its Delaware competitors are not required to pay, Lewes contends that the Order places it at a competitive disadvantage in Delaware which constitutes "an economic trade barrier against entering Maryland" (Pet. 6). The Secretary found, however, that the record failed to establish the existence of any competitive disadvantage to petitioner's operations resulting from the Order, and consequently that there was no trade barrier. The court of appeals held that the Secretary's determination was supported by substantial evidence. This decision, which petitioners concede "is largely a discussion of the proof" (Pet. 12), is correct and makes it unnecessary to reach petitioner's broader challenge to the Order.

1. 7 U.S.C. 608c(15) provides that judicial review of administrative proceedings under the Agricultural Marketing Agreement Act is limited to determining whether the Secretary's ruling is "in accordance with law". The courts have recognized that they may set aside the Secretary's findings of fact only when they are not supported by substantial evidence. *Freeman* v. *Hygeia Dairy Co.*, 326 F. 2d 271, 273-274 (C.A. 5); *United States* v. *Mills, supra*, 315 F. 2d at 836, 838; *Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860, 862 (C.A. 3); *Windham Creamery, Inc.* v. *Freeman*, 230 F. Supp. 632 (D. N.J.), affirmed, 350 F. 2d 978 (C.A. 3), certiorari denied, 382 U.S. 979.[10]

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[10] This is, of course, the usual standard applied in judicial review of agency determinations. See, *e.g.*, *National Labor*

In the present case, the court of appeals correctly held that the Secretary's finding of no competitive disadvantage was supported by substantial evidence in the administrative record. The keystone of petitioner's "trade barrier" argument necessarily is the assertion that the Order compels Lewes to pay more for raw milk than its unregulated Delaware competitors. If the competitors do not acquire milk cheaper than Lewes, then the Order does not give its competitors a cost advantage, and it does not raise any economic barrier discouraging Lewes from selling its milk in Maryland. Lewes apparently takes the position that the mere fact that it must pay minimum prices which its competitors are not required to pay is dispositive of the issue. But that overlooks the possibility that there may be factors which increase the costs to Lewes' competitors above the minimum prices. As the court of appeals stated in the previous decision in this case, the existence of a "trade barrier" may be shown only by evidence "sustain[ing] the factual realities of the legal arguments". *United States* v. *Lewes Dairy, Inc.*, 337 F. 2d 827, 832 (C.A. 3), certiorari denied, 379 U.S. 1000. And in *Lehigh Valley Coop* v. *United States*, 370 U.S. 76, this Court did not hold the compensatory payment plan there illegal *per se*, but found the existence of a "trade barrier" "with respect to these petitioners" [11] only after observing that on "the facts of the case now before us" the payment require-

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Relations Board v. *Walton Mfg. Co.*, 369 U.S. 404, 405; *Swift & Co.* v. *United States*, 343 U.S. 373, 382; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508; *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 477.

[11] 370 U.S. at 99.

ment put the handlers at a competitive disadvantage, 370 U.S. at 86. The Court noted that under the Order in that case, the total cost of sales by petitioner Suncrest Farms was $9.18 per cwt., while its competitors within the marketing area had to pay only $6.23 per cwt. (*ibid.*)[12]

The crucial fact to be established, therefore, was the price paid for raw milk by the unregulatd Delaware competitors of Lewes. As the complaining party, Lewes had the burden of establishing facts to support its allegations,[13] for the Secretary's Marketing Order —like the determinations of any administrative agency—has the benefit of a presumption of the existence of facts justifying its validity. *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 567-568; *Pacific States Co.* v. *White*, 296 U.S. 176, 186; *Lawson Milk*

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[12] Petitioner emphasizes (Pet. 15) the Court's statement in *Lehigh Valley* that "Nor is the compensatory payment clause saved by the circumstance that in some instances it may also fortuitously operate to put the handlers of pool and non-pool milk on a competitive par." 370 U.S. at 98. That statement, however, does not mean that a handler does not have the burden of proving the existence of a trade barrier with respect to his own specific situation. To the contrary, the Court's statement indicates that because of the effect of creating a competitive disadvantage for the petitioners there, the marketing order created a trade barrier notwithstanding the fact that as to other handlers the order only put them on a competitive par with producers in the marketing area.

[13] *Windham Creamery, Inc.* v. *Freeman, supra; Newark Milk & Cream Co.* v. *Benson*, 287 F. 2d 681 (C.A. 3); *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209 (E.D. Mo.), affirmed, 157 F. 2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Boonville Farms Cooperative, Inc.* v. *Freeman*, 358 F. 2d 681 (C.A. 2).

Co. v. *Freeman*, 358 F. 2d 647, 649 (C.A. 6); *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; *Bailey Farm Dairy Co.* v. *Jones*, *supra*.

But petitioner did not introduce evidence of the actual prices paid for milk by its unregulated Delaware competitors. This information, essential to Lewes' contentions, is nowhere contained in the administrative record. The sole witness called by Lewes was its treasurer, who testified that there were between 500 and 600 farmers in the area of Delaware from which Lewes buys its milk and that all but 100 of these farmers sell their milk to handlers regulated by other federal milk marketing orders (Pet. App. 76a). Although asserting that the Order enabled competitors to purchase milk at lower costs, he did not testify to the prices paid to farmers by any of Lewes' Delaware competitors (Pet. App. 76a)[14] and "no other evidence was offered by Lewes on this crucial point" (*ibid*). The court of appeals observed that the "Secretary declined to give the uncorroborated testimony offered by Lewes the credence with which the District Court vested it" (Pet. 80a), or, it might be added, the credence petitioners contend this Court must give it.

Moreover, the Secretary offered evidence showing that Lewes' milk sales in Delaware, the area where it is allegedly at a competitive disadvantage, have grown

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[14] Thus, while Lewes' treasurer made the conclusory statements that the Delaware farmer market is a "free, open" one in which Lewes "must pay at least as much to the downstate Delaware farmers for milk as the other downstate Delaware dairies must pay" (Pet. 14), he failed to testify as to what those prices were.

steadily since the inception of the marketing order in 1960 (Pet. App. 79a). Thus, far from there being any evidence that the Order impaired Lewes' ability to compete with its Delaware competitors, the evidence introduced at the administrative hearing pointed to the fact that Lewes was fully capable of competing, and clearly supports the Secretary's finding that the Order did not create a trade barrier against Lewes' competing in the Maryland market.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1969.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part:

7 U.S.C. 608c(5)

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classfying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. * * *
>
> (B) Providing:
>
> (i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them * * *; or
>
> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered * * *.
>
> (C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that

the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

7 U.S.C. 608c(15)

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary

by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *

Milk Marketing Order No. 16 is set forth at 7 C.F.R. Part 1016.

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